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No.: 88-1985

IN THE

Supreme Court of the United States

October Term, 1988

MARGARET HUDSON,

Petitioner,

against

NATIONAL RAILROAD PASSENGER CORPORATION,

Respondent.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Preliminary Statement

In this action brought under the Federal Employers' Liability Act (FELA), petitioner Margaret Hudson seeks a writ of certiorari to review the summary order of the United States Court of Appeals for the Second Circuit dated February 6, 1989, which affirmed the judgment of the U.S. District Court for the Southern District of New York (Knapp, J. and a jury) entered July 25, 1988 on the jury's unanimous verdict in favor of respondent National Railroad Passenger Corporation (Amtrak).

Statement of the Case

Petitioner claims she suffered emotional injury as a result of allegedly being sexually harassed by a co-worker (Edward Kortright) while she worked at Amtrak's Crew Base area in New York's Penn Station. Petitioner commenced this FELA action against Amtrak alleging that it negligently failed to prevent the sexual harassment and thereby failed to provide her with a safe place to work. After a full trial, the jury found that, while plaintiff had been harassed by Kortright, Amtrak was not guilty of negligence. The Second Circuit affirmed the verdict, rejecting the various unpreserved jury charge issues raised by petitioner on appeal.

This Court should similarly reject petitioner's request for a writ of certiorari. Notwithstanding petitioner's attempt to present this as a case involving burning social issues which should be resolved by the nation's highest court, this is in fact an ordinary negligence case which turned entirely on the jury's resolution of disputed factual issues. The case presents no significant issue of law, and the summary decision of the Second Circuit, to the extent it even considered any legal questions, does not conflict with the decision of any other Circuit Court. Furthermore, the jury charge issues now raised by petitioner were not preserved for review since they were never raised during trial before the district court.

In an attempt to engender sympathy and to manufacture issues for this Court's review, petitioner presents a one-sided version of the evidence and an unfairly slanted description of the district court's charge. Petitioner thus hopes to create the impression that the jury's rejection of her claim was a grave miscarriage of justice which could only have been the product of a defective jury charge. Contrary to petitioner's claim, however, a balanced view of

the evidence shows that the jury's verdict was fully supported by the proof and that the court's charge was entirely proper.

For example, petitioner's case is premised on the claim that Kortright harassed her continually from March through August of 1984, during which time Amtrak management allegedly ignored her repeated pleas for help. Amtrak's proof, however, established that when it was first informed of the alleged harassment in mid-March, Kortright was immediately warned by his supervisors to leave petitioner alone. Thereafter, no further alleged incidents were reported to Amtrak until petitioner filed her EEO complaint in August. Petitioner's own EEO complaint supports Amtrak on this point, moreover, since contrary to her trial testimony of continual harassment, her complaint alleges no incidents of harassment for four months after Kortright was admonished in March. The proof also established that Amtrak immediately acted on petitioner's EEO complaint once it was filed and brought Kortright up on appropriate charges. Those charges had to be dropped, however, because petitioner failed to attend hearings or otherwise pursue her allegations of harassment, other than through this lawsuit.

Similarly, petitioner asserted at trial that she was forced to leave Amtrak in September of 1984 because she was emotionally disabled as a result of the alleged harassment. However, petitioner's own medical evidence showed that whatever emotional problems she had long predated the alleged harassment, and her brief employment at Amtrak's Crew Base was consistent with her prior 10-year work history in which she held no less than 12 different positions, rarely staying at any one more than a few months. Petitioner's claim of disability was also refuted by the evidence that, after leaving Amtrak in 1984, she obtained a real estate license and has since enjoyed a successful career

selling real estate, although continuing her life-long pattern of frequent job changes.

As for the court's charge to the jury, it was entirely fair and proper. To support her claim for a million dollar damage award, plaintiff produced the testimony of three medical experts who claimed that plaintiff's fragile mental condition was such that the relatively minor incidents of harassment by Kortright allegedly devastated her emotionally. Since Amtrak was concededly unaware of plaintiff's alleged susceptibility to sexual harassment, the court charged the jury that Amtrak had no duty to take extraordinary precautions to protect her from such harassment. Amtrak was only obligated to exercise reasonable care so as to protect the ordinary person at its workplace. Pursuant to petitioner's counsel request, the court further charged that if Amtrak was found negligent it was liable for all resulting injuries suffered by petitioner, even if those injuries were enhanced by any susceptibility on her part. This was a correct charge, and contrary to petitioner's new assertion on appeal, at no time during its charge did the court inform or even hint to the jury that it believed that petitioner was in some way abnormal.

In short, and all of petitioner's rhetoric aside, this case presents nothing more than a highly dubious tort claim that was met with convincing opposing proof and that was rejected by a jury. Petitioner has attempted to obtain a second trial, first by raising a host of unpreserved and meritless charge issues before the Second Circuit, and now by attempting to persuade this Court that the case presents important issues of law and public policy. However, the only way the interests of public policy will be served in this case is by once and for all laying it to rest. The petition should be denied.

Statement of Facts

Petitioner's prior employment history; a pattern of repeated job changes

Petitioner worked at the Amtrak Crew Base for a six month period from March 1, 1984 until September 12, 1984. Petitioner claims that she left this job because of severe emotional problems caused by Kortright's alleged harassment which Amtrak allowed to occur. A review of petitioner's employment record, however, reveals that her brief employment at Amtrak's Crew Base was consistent with her prior work history. Indeed, in her ten year work-life prior to working at Crew Base, petitioner held twelve different positions, most for only a few months.

During the year and a half after she graduated from secretarial school in December 1979, petitioner changed jobs three times. She first worked as a legal secretary at a law firm for five months from January to May, 1974; at another law firm for about four months from June to September, 1984; and at a third firm from about October 1974 to July 1975, approximately nine months (T35-38, 155).*

In July 1975, petitioner began working for Amtrak in Washington, D.C., in revenue accounting (T38-39). Ten months later she transferred to Amtrak's Philadelphia office (T39, 155-56). In August 1980, she resigned from Amtrak (T40-41) and began her own business doing typing at home for small businesses (T44, 157-8).

In the fall of 1981, petitioner went to work for New Jersey National Bank (T44). In the fall of 1982, she left that

*Numbers in parentheses preceded by "T" refer to pages of the trial transcript. Numbers preceded by "A" refer to pages of the joint appendix in the Second Circuit. References to the separately transcribed medical testimony are preceded by the witness' name.

job to work for a small company in West Trenton, New Jersey (T44). In May 1983, she went to work for an accounting firm for three months (T45).

Petitioner returned to work for Amtrak in August 1983 in the engineering department in Philadelphia (T45, 158), where she remained for three months. In November 1983, she transferred to Amtrak in New York (T51-52) where she worked in the labor relations department in Penn Station for three months. In March 1984, she voluntarily took a demotion and transferred to the Crew Base to work as a secretary, where she remained for six months until September 1984 (T55-56, 159).

Petitioner's successful real estate career after leaving Amtrak

Although plaintiff claimed to be emotionally disabled when she left Amtrak in September 1984, the proof established that in December 1984 she and her husband successfully completed a course in real estate (T142). In one of her subsequent job applications for a real estate position, petitioner gave her reason for leaving Amtrak as "career change." In that application, petitioner stated that she chose real estate as a career "for the ability to earn a living in direct proportion to the effort I'm willing to put into my career" (A148).

In January 1985, four months after she left Amtrak, petitioner and her husband successfully sat for the state real estate exam and both received their real estate licenses (T143). In March 1985, after one month on her first real estate job, petitioner sold her first house (Testimony of Barry Belt at 113-14).

One month later, petitioner changed jobs and began working for Century 21 as a sales associate (T216, 221).

While at Century 21, in 1985, petitioner became a member of the Million Dollar Club by selling a million dollars worth of property (T218). In the fall of 1986, she was promoted to sales manager (T221), with her responsibilities including the "organization and motivation of sales force, recruiting, listing and sales" (A148). She also took a course, "Effective Financing", as a part of her continuing real estate education (T219). Petitioner remained with Century 21 until March 1987 when she moved to Wykert Realtors (T216). She worked at Wykert for nine months until the end of December 1987 (T224). She then moved to Edward H. Myers & Son, where she was employed at the time of trial (T224).

The sexual harassment and the alleged notice to Amtrak

Petitioner claims that Edward Kortright, a low-level Crew Base supervisor with no authority over her, continuously harassed her from March to August 1984, except for a brief period when Kortright was warned in mid-March to stay away from her. (T167).

Petitioner testified that after she started work at Crew Base, Kortright allegedly visited her work area on a regular basis, asked her personal questions, sat on the edge of a desk with his legs spread, and touched her arm (T62-67, T70-71).

Petitioner further claims that on March 13th Kortright misrepresented Crew Base policy to her husband and then finance Ken Hudson ("Hudson"), an Amtrak Supervisor of Structures at Penn Station, and refused to allow Hudson to enter the area so as to intimidate her (T67-73).

This March 13th incident led to a meeting on March 14th with Barry Sullivan, an Amtrak Regional Director of Passenger Services, and D. Thompson, an Amtrak Man-

ager, in which Hudson indicated he was going to the Crew Base area so often because of a problem petitioner was having with Kortright (T362). As a result of this complaint, Thompson and Luciano DePalo, General Supervisor of the Crew Base and Kortright's supervisor, immediately instructed Kortright to cease bothering and engaging in conversation with petitioner (T363-4). After this meeting, petitioner testified that for a while, during the end of March and part of April, there were no further problems (T83).

Petitioner claimed, however, at the end of April or in early May, there was an alleged incident in the copier room where Kortright came up behind her, put his arms around her and leaned into her, placing his chin on her shoulder (T79).

Petitioner also testified that throughout April and May, there were a lot of "near misses" between her and Kortright in which Kortright allegedly tried to block her way whenever she would pass him in the hallway (T83).

On July 18th, and again on August 13th, petitioner claims that Kortright blocked her path in the hallway (T86, 90-91). Thereafter, on August 20, petitioner filed her EEO complaint. On August 21st, Kortright again allegedly blocked her path (T108), and on August 27th Hudson was allegedly denied admission to the Crew Base area (T109-111). Finally, petitioner testified that Kortright continued to glare at her and try unsuccessfully to bump into her (T121). Petitioner's last day of work at Amtrak was September 12th.

Petitioner claims that she complained to Thompson and also repeatedly complained to her supervisor Frank Summa about the incidents with Kortright and that Summa would say he was going to talk to Sullivan or Thompson about Kortright (T80, 82-83).

The evidence refuting petitioner's claims and establishing that Amtrak acted reasonably.

A. *Amtrak's reasonable response and the absence of notice of any further incidents of harassment*

Amtrak's first notice of an alleged problem between Kortright and petitioner occurred as a result of the incident involving plaintiff's fiance's visits to Crew Base. In March 1984, Thompson complained that one individual was consistently disregarding the Crew Base security and insisting on entering the area unannounced several times a day (T358). Crew Base required strict security because the hearing officer responsible for disciplining employee was located there as were the confidential employees files (T357-59). Kortright, as a supervisor in Crew Base, was instructed to challenge this person who was repeatedly entering the office complex and to determine what his name was and what business he had there (T432, 437). On March 13th, Hudson attempted to enter the Crew Base area unannounced and was prevented from doing so by a clerk who requested an explanation of his business in that area (T509). Kortright was called to the scene and Hudson was told that all persons were required to check in at the Crew Base (T510).

The above incident led to the previously mentioned mid-March meeting with Hudson, Sullivan and Thompson wherein Hudson claimed that he was visiting the Crew Base to protect petitioner from the harassment of Kortright (T362). Amtrak's response was that it could not condone such actions by one employee toward another (T363) and Thompson and DePalo, Kortright's supervisor, immediately instructed Kortright to stay away from petitioner (T363-4). Amtrak was thereafter never notified of any

further problems between Kortright and petitioner until petitioner filed her EEO complaint in August (T364).

At the trial, Summa denied petitioner's claim that she repeatedly complained to him about Kortright. Summa testified that he never had any discussion at all with petitioner about her situation with Kortright (T572), and Sullivan testified that, contrary to petitioner's claims, Summa never talked with him about a problem between petitioner and Kortright (T377). Sullivan also testified that following the March meeting with Hudson, he heard nothing further about any alleged problems with Kortright until the EEO complaint was filed (T364).

DePalo similarly testified that petitioner never complained to him about Kortright (T422), and Summa also never told DePalo anything with regard to Kortright harassing petitioner (T429).

B. *Petitioner's EEO complaint, which refutes her trial testimony*

Petitioner testified that she kept a running diary from February 1984 until September 1984 listing the problems she allegedly had with Kortright (T164). Petitioner's EEO complaint filed on August 20th, however, failed to contain most of the more of dramatic incidents she testified to at trial. In her EEO complaint, petitioner lists Kortright's alleged visits to her work area between March 1st and March 14th wherein he allegedly assumed bodily positions with his legs spread. She also mentioned his allegedly discourteous behavior towards her finance (A126). However, the EEO complaint made no reference whatsoever to the alleged touching of petitioner's arm by Kortright. More importantly, following the alleged mid-March incidents, the EEO complaint contains no mention of any further incidents for the next four months (A126). Thus, missing from the EEO Complaint are the alleged hallway "near-

misses" in April and May the alleged copier room incidents in April and May in which Kortright allegedly put his arm around petitioner and leaned into her. This supports Amtrak's testimony that after Kortright was admonished by his supervisor in mid-March, there were no further reported incidents until the EEO complaint was filed.

C. *Petitioner's failure to pursue her EEO complaint against Kortright*

The evidence established that Amtrak's response to petitioner's EEO complaint was reasonable and timely.

Under Amtrak company procedure, when an EEO complaint is filed, the Personnel Office gathers the facts and makes a recommendation to the department which supervises the employee (T365). In this case, the Personnel Manager referred the complaint to Thompson, who was in charge of the Crew Base where Kortright was employed (T365). Thompson conducted a preliminary inquiry and decided that there was sufficient grounds to initiate charges and hold a hearing regarding this matter (T365). Although Kortright was a low-level supervisor, he was covered by the union agreement and therefore could not be disciplined without a formal hearing (T365-66). Further, because Kortright was a supervisor, the hearing had to be approved by Sullivan (T367). Thompson prepared the charges and Sullivan approved them (T367).

Petitioner filed her complaint on August 20th and, by October 3rd, Amtrak had accomplished all preliminary procedures and had scheduled a hearing for October 11, 1984. Petitioner did not appear on October 11th for the hearing (A130), however, and it was rescheduled for March 25, 1985 (A135). By this time petitioner was working as a real estate broker, and had sold her first house (T143, Belt at 113-14), but she again failed to appear (A137-8). The

investigation was ultimately rescheduled for September 8, 1986 and petitioner was informed that if she failed to appear on that date, Amtrak would be forced to drop the charges against Kortright (A141). Petitioner again failed to attend the hearing and the charges against Kortright were dropped (T204-05, A141).

The medical evidence

Petitioner presented the testimony of three medical witnesses on her behalf: her family physician, a psychiatrist and a psychologist. To support petitioner's unlikely claim that she suffered severe and permanent emotional injury warranting a million dollar award as a result of the alleged incidents with Kortright, petitioner's medical witnesses presented a picture of petitioner as a seriously troubled and emotionally fragile woman who was unable to cope with stress and who was susceptible to a severe emotional reaction to anything she might perceive as sexual harassment.

A. *Dr. John Howell*

Dr. John Howell was part of a group medical practice of which petitioner had been a regular patient since 1978. Dr. Howell testified that in his opinion petitioner had a prior emotional disorder and the stresses she suffered during her prior depression were significant and appeared to have contributed to the stress she perceived at her job in 1984 (Howell, 29, 126). According to Dr. Howell, petitioner had a long history of illness, including recurring intestinal spasms requiring antispasmodic drugs, a recurring ulcer requiring drugs and hospitalization, pancreatitis requiring hospitalization, and she had undergone a partial hysterectomy for cervical cancer (*Id.* at 11-12, 96-97, 98). In addition, petitioner has suffered from lymph edema and a nervous stomach since she was fifteen years old (*Id.* at 95-6), and for many years she took a thyroid replacement

hormone for a condition of hypothyroidism (*Id.* at 100, 103-4).

In 1981, petitioner was diagnosed as having exogenous depression, that is, depression caused by outside factors (*Id.* at 109). She was treated with anti-depressant medication which was not effective (*Id.* at 109), and later that year she was hospitalized for depression when she was taken off the antidepressant drugs (*Id.* at 112-3). Because petitioner was not helped by the usual array of anti-depressants, she was placed on certain rarely used drugs that rendered her susceptible to allegic reactions (*Id.* at 32-33).

Although petitioner visited Dr. Howell's group four times in March and again on August 7, 1984, she did not mention or complain about any stress at her job (*Id.* at 119-121). The first time petitioner complained about any such problem at work was on August 27th (*Id.* at 121), after she had filed her EEO complaint, and Dr. Howell thereafter diagnosed her as suffering from a panic disorder caused by the alleged sexual harassment (*Id.* at 48, 72). Dr. Howell testified that, by September 29th, petitioner had developed a near phobic fear of returning to her workplace and explained that a phobia is an unusual or irrational fear not supported by the actual problem at hand (*Id.* at 37-38).

In October 1986, Dr. Howell wrote to petitioner's counsel and stated that many of petitioner's symptoms had improved (*Id.* at 126). In February 1987, Dr. Howell again wrote that he was optimistic petitioner would be able to return to her former productive potential (*Id.* at 127).

B. *Dr. Michael Orlosky*

Dr. Michael Orlosky, a psychiatrist, saw petitioner in March 1987 and diagnosed a panic disorder (Orlosky at 10). Dr. Orlosky testified that, because of her preexisting mental condition, petitioner was susceptible to panic attacks (*Id.* at 101). He explained that "people with

agoraphobia and panic attacks usually have some sign of anxiety vulnerability preexisting" (*Id.* at 52; also see 72). Petitioner's medical history "would be consistent with an adult who later develops agoraphobia and panic attacks" (*Id.* 89). In addition, some of the medication petitioner was taking could cause generalized anxiety or recurrent panic attacks; manic symptoms such as being elated, eurphoric, irritable or agitated; restlessness, insomnia, dizziness and stomach pain (*Id.* at 62-3, 67).

C. *Barry Belt*

Barry Belt, a clinical psychologist, saw plaintiff in October of 1984, allegedly in connection with stress caused by her work situation. Belt testified that plaintiff had "a history of vulnerability, coping with stress" (Belt, 73). He stated that "[w]hen you have a condition where your coping skills are very limited, any kind of a change, like moving into a new house or even going on vacation, anything creates a considerably more stress hypothetically, even it would for people who do not have a mental condition" (*Id.* at 138).

The charge conferences

In discussing the charge conferences and the charge, petitioner attempts to give the impression that the district court was hostile towards her case and unfairly charged the jury that she was "abnormal" and "peculiar." The record shows otherwise, and establishes that the court held a full and open discussion of all charge issues; candidly expressed its views and encouraged both counsel to give their views; permitted ample opportunity for requests and exceptions; and ultimately gave a fair and balanced charge in which petitioner's trial counsel could find little that was objectionable.

During the charge conferences the court discussed with counsel what the appropriate charge should be in light of

the medical testimony which, if accepted by the jury, seemed to indicate that petitioner's was highly susceptible of panic from any approach which could be construed as sexual (A23, A27-28, A28-29, A30-31, A32-33, A34-35, A42-43). In the course of these discussions, petitioner's counsel conceded that petitioner's reaction to the sexual harassment might have been "extraordinary" (A33), but argued that under the "eggshell" principle, a negligent defendant is legally responsible for all consequences of its actions, even those that might be considered unusual or unexpected from the standpoint of the defendant (A33, A42). The court stated that it agreed with petitioner regarding the eggshell theory but questioned whether Amtrak could be found negligent at all if it was unaware of petitioner's heightened susceptibility since "in making your decision of what's reasonable and what's not reasonable, you have to know what risks are involved" (A33).

After further discussions, petitioner's counsel conceded that, with respect to petitioner's heightened susceptibility, "[t]here is no evidence in the case [Amtrak] knew about it or could have known about it or should have known about it in any way" and "[t]here is no way for Amtrak to be aware of any of this" (A44).

The court thereafter stated that it would give petitioner's eggshell theory charge. That is, if Amtrak was found negligent "then it is no defense to them to say they didn't know the result would be so serious" (A50). The court also noted that it would charge that since Amtrak was unaware of any special susceptibility on the part of petitioner, it had no duty to take special precautions. Amtrak was only subject to a reasonable man standard, *i.e.*, "the question is not whether Amtrak used the care that would have been required had they known of Mrs. Hudson's peculiar situation, the question is have they used the reasonable care which a reasonable person would have used to minimize the instances of

harassment to the extent possible, and contained the damage, if such should occur. That is your question" (A50). The court further stated that it would not charge that petitioner was "abnormal" (A60).

The mini-charge and summations

In its brief mini-charge, the court noted that, under the FELA, Amtrak was required to provide petitioner with a safe place to work and that petitioner alleged Amtrak failed to do so because it had permitted her to be subjected to sexual harassment. The court charged that the jury first had to determine whether the alleged harassment took place, and then, if it did, whether Amtrak had been negligent in failing to provide a safe work place. If the jury resolved these issues in petitioner's favor, it then had to go on to consider whether the claimed damages had been caused by Amtrak's negligence (A66-69).

Petitioner's counsel thereafter gave his summation (T635-77) in which he stressed petitioner's allegation that she was continually harassed by Kortright and that her repeated pleas to management for help were ignored. While acknowledging petitioner's prior emotional problems, he urged the jury not to be swayed by anticipated defense arguments that petitioner's present emotional state was unrelated to any alleged sexual harassment by Kortright (T639-42).

Defense counsel in his summation stressed that whether or not Kortright had committed the harassment alleged by plaintiff, Amtrak did all that was reasonably possible under the circumstances. When Amtrak became aware of a potential problem in March 1984, Kortright was immediately instructed to stay away from petitioner and no further incidents of harassment were thereafter reported until petitioner filed her EEO complaint. To the extent

petitioner had any alleged heightened susceptibility to harassment, counsel pointed out that since Amtrak was concededly unaware of it, it was not obligated to take special precautions to protect petitioner. Counsel further argued that any emotional problems presently suffered by petitioner were unrelated to the alleged harassment and were instead a continuation of her pre-existing troubles. Counsel additionally noted that petitioner's emotional problems were in any event vastly exaggerated in view of her successful real estate career after she left Amtrak (T684-727).

In his rebuttal summation, petitioner's counsel stressed the eggshell theory, arguing that while petitioner might possibly be considered to have a "greater susceptibility" to harassment which Amtrak did not know about, this was no defense for Amtrak if they were negligent (T732-33).

The court's charge

After advising the jury that Amtrak is required to use "reasonable care to provide a reasonably safe workplace for all of its employees, including this plaintiff," (A88) the court gave the jury the standard definition of negligence:

> Amtrak is responsible to see to it that it uses reasonable care, and that means the care that you think a reasonable person in the management of his own affairs would do in a situation involved (A89).

The court thereafter instructed the jury as to the standard by which it should measure Amtrak's conduct. As it had indicated at the conclusion of the charge conferences, the court did *not* advise the jury that petitioner had any heightened susceptibility. It stated that this issue was for the jury to resolve and that in any event, such alleged susceptibility was not to be considered in measuring Amtrak's duty of care. Amtrak was required to exercise reasonable care to protect the ordinary person at the workplace (A90-91).

The court then gave the charge requested by petitioner's counsel on the eggshell theory, specifically adopting the argument petitioner's counsel had made in summation:

> But on the other hand, as Mr. Sable told you, if it turns out that you conclude, A, that these things happened, and B, that Amtrak's failure to use the care necessary to prevent this king of injury to a normal person, that makes them negligent, if you find that. Then they can't be heard to say we didn't know it would be so bad. If they were negligent, the care they took was not sufficient in your judgment to give proper protection to a perfectly normal person, then they are responsible. Then their negligence caused this event and they can't be heard to say, oh, we didn't know it would be so bad. Do you follow the difference? (A91-92).
>
> * * *
>
> [I]t is like I think Mr. Sable told you about the eggshell theory, and that's a pretty good theory. I adopt what he said about the eggshell. So if the preexisting conditions merely made her more susceptible to injury by what is normally sexual harassment, then the preexisting injuries are no defense (A95).

After the court concluded its main charge, there was another conference in the robing room. Other than one exception on the question of work-life expectancy for purposes of damages computation, petitioner's counsel had no exceptions to the charge (A101-02, A108).

The jury's verdict and the Second Circuit's decision

At the conclusion of the trial the jury found that, while petitioner had been harassed by Kortright, Amtrak had not

been negligent in its response to the harassment. The court thus entered judgment in favor of Amtrak (A116, A119, T792-93).

On appeal to the Second Circuit, petitioner asserted that a new trial was required on the basis of various alleged unpreserved charge errors, many of which she again raises before this Court. In a summary order of affirmance, the Second Circuit rejected petitioner's claims, writing:

> "The charge given by the district court was a fair statement of FELA law as it should apply to the circumstances of this case. The court's references to plaintiff's possible over susceptibility to injury from conduct of the type complained of were appropriate in light of the evidence and arguments of counsel. Plaintiff received a fair trial."

ARGUMENT

I

Certiorari should be denied since petitioner's failure to object to the charge or to raise her claims below precludes her from raising them on appeal.

The law is well stated that "an error in a jury charge will not be considered on appeal unless a timely objection was made at trial, stating the nature of, and the ground for, the objections." *Air Et Chaleur, S.A. v. Janeway,* 757 F.2d 489, 492 (2d Cir. 1985). "The purpose of requiring a timely objection is to identify the disputed issue and give the trial judge a chance to correct error which might otherwise necessitate a new trial." *Robertson v. Shapiro,* 646 F.2d 734, 742 (2d Cir. 1981).

"When no objection has been made to a jury charge reversal will only be warranted where the instructions given

amount to plain error." *Almonte v. National Union Fire Ins. Co.*, 787 F.2d 763, 767 (1st Cir. 1986). The plain error exception, however, "must be applied sparingly and only in exceptional cases or under peculiar circumstances to prevent a clear miscarriage of justice". *Id.* at 769.

Pursuant to these well settled principles of law, petitioner is precluded from raising each and every issue she asserts on appeal since not one of these points was adequately raised during the trial.

Petitioner's primary contention on appeal is that she was denied a fair trial because of the court's hostile and biased charge which unfairly portrayed her as a weak and abnormal person because she was unable to stand up to Kortright's harassment. Despite this argument, plaintiff's experienced counsel voiced not a single objection to that effect below and, indeed, never once during the trial suggested the court was treating petitioner's claim other than completely fairly. This is because petitioner's bias argument is nothing more than creative appellate advocacy. It is completely without substance and not worthy of this Court's consideration.

The same is true with respect to petitioner's arguments that the court erred in defining negligence and the measure of duty owed to petitioner by Amtrak. Petitioner's counsel never once took issue with the court's change on these issues. This was so even though petitioner's counsel heard the court's charge on numerous occasions at the conferences and again when the actual charge was delivered. Indeed, petitioner's counsel specifically *objected* to the Court's giving any further charge on negligence, as was suggested by defense counsel. These claims too were therefore waived. Finally, petitioner's counsel also never took exception to the court's causation charge.

In short, petitioner's appeal presents nothing that has been preserved for review by this Court and her claims therefore should be summarily rejected. While this Court could review the issues under the plain error rule so as to prevent a miscarriage of justice, the plain error rule has no application to this case. Not only was there no reversible error in the charge (see below), let alone the kind of egregious error needed to invoke the plain error rule, but the jury's verdict is anything but a miscarriage of justice. The verdict simply represents the jury's rational decision not to accept petitioner's claims in light of their improbability and in the face of defendant's highly persuasive opposing proof.

II

Certiorari should be denied since this case presents no significant legal issues. In addition, petitioner's charge issues are completely without merit. The Court's charge fairly presented the law as it applies to this case.

There is no reason for this Court to grant certiorari to review this case. It is a negligence case presenting disputed factual issues that were resolved by the jury. There are no issues of public importance presented, and, contrary to petitioner's claim, this is not even a sexual harassment case. Petitioner does not allege she was denied a promotion or otherwise sexually harassed or discriminated against by Amtrak. She merely claims that Amtrak was negligent in allegedly failing to protect her from a fellow employee. And, her various claims of error merely challenge the discretionary decisions made by the district court in conducting the trial. Review of those rulings is not likely to generate issues of law of national importance so as to warrant this Court's attention. Finally, and perhaps most importantly, all of the points raised by petitioner are completely without merit.

The charge was fair and correct

"It is by now axiomatic that a Court's charge must be tested by viewing it as a whole." *Fernandez v. Fitzgerald,* 711 F.2d 485, 487 (2d Cir. 1983). An appellate court "must decide whether the entire charge, viewed in light of all of the evidence, would tend to confuse or mislead the jury as to the principles of law that apply to the facts." *National Railroad Passenger Corporation v. 25,900 Sq. Ft. Parcel of Land,* 766 F.2d 685, 688 (2d Cir. 1985). The court's charge here, taken as a whole and considered in relation to the evidence that was before the jury, fairly presented the law as it applies to this case.

When charging the jury, "the trial judge is given wide discretion as to the style and wording that he may employ." *Andres v. Roswell-Windsor Village Apts.,* 777 F.2d 670, 673 (11th Cir. 1985), and "the fact that the instructions are technically imperfect or are not a model of clarity does not render the charge erroneous". *Robinson v. Monsanto Co.,* 758 F.2d 331, 335 (8th Cir. 1985). *Miller v. Rykoff-Sexton, Inc.,* 845 F.2d 209, 212 (9th Cir. 1988).

Put another way, "no particular form of words is essential if the instruction as a whole conveys the correct statement of the applicable law." *Furr v. AT&T Technologies, Inc.* 824 F.2d 1537, 1549 (10th Cir. 1987).

In the instant case, the court properly incorporated all of the relevant legal elements into its charge and presented them to the jury is straightforward laymen's terms, thereby making it far more likely the jury would be in a position to understand and properly apply the applicable rules of law. Furthermore, as explained below and as found by the Second Circuit, the court's charge was balanced and fair in every respect.

The alleged emphasis on petitioner being abnormal

Contrary to petitioner's claim, nothing in the court's charge could reasonably be construed as giving the jury the impression the court was biased against petitioner or believed she was peculiar. The court carefully refrained from voicing any opinion on the case in the presence of the jury and repeatedly instructed the jury during the course of the trial and the charge that the court had no opinion on any factual matter because the court's opinion on the facts was of no value whatsoever. It was for the jury alone to resolve the facts (T626-30, T537, T677, T756, T761).

The court's statement to the jury that it had "heard a lot of discussion pro and con, both ways, about whether the plaintiff was different than normal people" (A90-91) was accurate in view of the medical testimony and was precisely the point that petitioner's counsel himself had acknowledged in the rebuttal summation (T732-33). Furthermore, far from expressing any opinion on petitioner's condition, the court left it to the jury to consider whether petitioner had an "inordinate susceptibility" and instructed them that, in any event, since Amtrak was concedely unaware of it, this was not a factor for the jury to consider in determining whether Amtrak acted reasonably.

The only references made by the court to any susceptibility on the part of petitioner was in its "eggshell" theory charge which the court gave pursuant to petitioner's counsel's request. In this charge the court paraphrased and specifically adopted petitioner's counsel's own language used in his summation (compare A91-92, A95 with T732-33), prompting defense counsel to raise an objection (A102-03). Petitioner has absolutely no cause to complain about this charge and, indeed, this is precisely why her counsel raised no objection at trial.

Amtrak's duty of care owed to petitioner

Although petitioner's counsel conceded at trial that Amtrak had no awareness of any heightened susceptibility on petitioner's part, petitioner now asserts that the court erred in charging that Amtrak was only obligated to exercise reasonable care so as to protect the ordinary person at the work place. Petitioner asserts that the concept of negligence "includes the obligation to regulate one's conduct with a view to a range of other people's disabilities and frailties" (Petition at 35).

Petitioner's argument flies in the face of basic principles of negligence law. In the legendary New York case of *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339 (1928), and New York law is concededly applicable here, Judge Cardozo made the classic observation that "[t]he risk reasonably to be perceived defines the duty to be obeyed." The courts have long since uniformly held that a defendant only has a duty to guard against risks that are foreseeable, and "[f]oreseeability means that which it is objectively reasonable to expect, not merely, what might conceivably occur." *Peck v. Ford Motor Co.*, 603 F.2d 1240, 1246-47 (7th Cir. 1979). *Accord Levine v. City of New York*, 309 N.Y. 88, 92-93 (1955); *Dacchille v. New York World Tel. Corp.*, 20 A.D.2d 892, 248 N.Y.S.2d 1021 (2d Dep't 1964), *aff'd*, 15 N.Y.2d 923, 258 N.Y.S.2d 845 (1965); Prosser & Keeton, *The Law of Torts* § 31, at 170 (5th ed. 1984) (negligence is unreasonable risk, and risk "necessarily involves a recognizable danger, based upon some knowledge of the existing facts . . ."); 3 Harper, James & Gray, *The Law of Torts* § 16.9 (2d ed. 1986).

Since petitioner's counsel stipulated at trial that Amtrak had no knowledge, nor any reason to know, of petitioner's alleged frailties, it is simply absurd for petitioner to suggest

that the court should have charged Amtrak with a duty to take extraordinary precautions to protect petitioner. Reasonable care under the circumstances was all that was required.

The court also charged the jury that "reasonable care . . . means the care that you think a reasonable person in the management of his own affairs would do in a situation involved" (A89) and that the "[negligence] of Amtrak is if . . . [it] fails to take such steps as you find a reasonable person in their position would take, in the management of their own affairs . . ." (A108). Notwithstanding the assertions in petitioner's brief, this charge is not materially different from the negligence charges requested by both petitioner and defendant or from the pattern jury charge. *See* 3 Devitt, Blackmar & Wolff, *Federal Jury and Practice Instruction, Civil* § 94.02 (4th Ed 1987). This charge was proper.

Causation

While petitioner critizes the court's charge on causation, the point is academic since the jury returned a verdict finding that Amtrak was not guilty of negligence and therefore never reached the next issue of whether petitioner's alleged injuries had been caused by Amtrak's negligence.

Furthermore, the court properly charged the jury on causation, giving the precise eggshell theory requested by petitioner and otherwise carefully explaining to the jury how it should resolve the causation issues. While the court declined to give a strict *Rogers v. Missouri Pacific R. Co.*, 325 U.S.500 (1957) charge, this was proper under the circumstances since that case, which governs the usual FELA work-site accident, is not neatly translatable to the different type of FELA claim asserted by petitioner in this

case. The law, moreover, does not require that the court use any "exact language" in its charge. *Denniston v. Burlington Northern, Inc.*, 726 F.2d 391, 393 (8th Cir. 1984). All that is required is that the court give a fair statement of the correct legal issues, which the court did.

CONCLUSION

The petition for certiorari should be denied.

Dated: New York, New York
July 28, 1989

Respectfully submitted,

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